

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF PENNSYLVANIA

DAVID PIERGROSSI,

***FILED ELECTRONICALLY***

Plaintiff,

CIV. ACTION NO. 2:17-cv-01575

vs.

DR. PAUL NOEL and  
DR. MICHAEL HERBIK,

Defendants.

**MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY  
JUDGMENT<sup>1</sup>**

Now comes Defendant, Dr. Michael Herbik, and hereby moves for dismissal of Plaintiff's Complaint for the reasons comprehensively set forth in the accompanying Brief in Support.

WEBER GALLAGHER SIMPSON STAPLETON  
FIRES & NEWBY LLP

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<sup>1</sup> Defendant brings this Motion under Rule 56 in the alternative because one of the arguments is the failure to exhaust administrative remedies, which requires the use of the administrative record from the prison system's grievance process. Case law from the Third Circuit provides unclear guidance on whether the reliance on such administrative record requires conversion to a Rule 56 motion, or may be addressed in a Rule 12 Motion or a Motion for Judgment on the Pleadings, and thus movant leaves this to the Court's discretion.

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Dated: February 5, 2018

**CERTIFICATE OF SERVICE**

I, Meghan Adkins, , hereby certify that on this date a true and correct copy of the foregoing **MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** was served upon the following counsel *via* CM/ECF:

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/s/ Meghan K. Adkins  
Meghan K. Adkins, Esquire

Dated: February 5, 2018